

## ERNST FREUND—PIONEER OF ADMINISTRATIVE LAW

### I. BIOGRAPHICAL SKETCH

Ernst Freund was born in New York City on January 30, 1864, during a visit of his family to the United States from their native Germany. Much of his education took place in Germany, a fact that significantly influenced his views on administrative law. He studied successively at Dresden, Frankfurt, Berlin, and Heidelberg, receiving the J.U.D. degree from the University of Heidelberg in 1884. From 1886 to 1894 he was engaged in the practice of law in New York City. In 1892 he started his long career in teaching, beginning at Columbia College as professor of administrative law. He obtained a Ph.D. in political science from that institution in 1897.<sup>1</sup> In 1894 he joined the newly created University of Chicago as professor of political science, teaching Roman Law and Jurisprudence. In 1902 he became a member of the original faculty of the law school. He was appointed the first John P. Wilson Professor of Law in 1929, a position which he held until his death on October 20, 1932.<sup>2</sup>

### II. WHAT IS ADMINISTRATIVE LAW?

In retrospect, it is relatively easy to see that the growth of the administrative process was, in the words of Mr. Justice Jackson, "the most significant legal trend of the last century . . ."<sup>3</sup> But at the turn of the century, American legal scholarship was largely unaware of what was beginning to emerge. Two exceptions to this understandable unawareness existed in the persons of Frank Goodnow and Ernst Freund. Significantly enough, both men possessed not only backgrounds in the law, but also in political science. Goodnow seems to have been the first to use the term "administrative law" as an inclusive and descriptive term for the law governing the administrative process.<sup>4</sup> Writing in 1894, Freund observed that until recently administrative law had attracted no attention from either English or American jurists. He noted that the field was not even distinguished by a commonly accepted name. He expressed the hope that the term "administrative law," as used by Goodnow the

<sup>1</sup> His last degree, an honorary LL.D., was bestowed upon him by the University of Michigan in 1931, one year before his death.

<sup>2</sup> HANDBOOK OF THE ASS'N OF AM. LAW SCHOOLS AND PROCEEDINGS OF THE THIRTY-FIRST ANNUAL MEETING, 163-64 (1933); 21 *DICTIONARY OF AMERICAN BIOGRAPHY* (supp. 9) 323 (1944); Kent, *Ernst Freund—Jurist and Social Scientist*, 41 *J. POL. ECON.* 145 (1933); Kent, *The Work of Ernst Freund in the Field of Legislation*, 1 *U. CHI. L. REV.* 94 (1933); *N.Y. Times*, Oct. 21, 1932, p. 21, col. 4; *Chicago Tribune*, Oct. 21, 1932, p. 9, cols. 3 and 4.

<sup>3</sup> "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 487 (1952).

<sup>4</sup> GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* (1893).

year before, would become the accepted term. He foresaw that administrative law would eventually become an accepted branch of public law:

The body of law which is thus developed regulates and limits governmental action without involving constitutional questions. Its subject matter being the administration of public affairs, as distinguished from legislation on the one side and from the jurisdiction of the courts on the other. . . .<sup>5</sup>

The dichotomy made between constitutional law and administrative law as early as 1894 is better appreciated when it is understood that this differentiation was not fully seen by many of the great legal scholars until well into the 1930's.<sup>6</sup> Freund was later to add to this early definition a statement that should constantly be borne in mind by students of administrative law: "Administrative Law continues to be treated as law controlling the administration, and not as law produced by the administration."<sup>7</sup>

It is clear that Goodnow and Freund, who was Goodnow's student at Columbia, were the pioneers of administrative law; however, Goodnow's greatest contribution was to the field of political science, whereas Freund's writings more definitely set the direction for the study of administrative law as it would be taught in the law school.

Goodnow's early casebook, *Cases on Government and Administration*,<sup>8</sup> today would be classified as a work primarily in the field of public administration and political science. His *Law of Officers and Extraordinary Remedies*<sup>9</sup> did not point the way toward what would come to be considered the field of administrative law. The first part of the book dealt with the law of officers, a topic not now discussed under any field of the law in the law schools. The latter part of the book contained long and detailed analysis of extraordinary remedies, a subject which now is generally deemphasized. Goodnow's *Principles of Administrative Law of the United States*<sup>10</sup> came closest to the direction Freund's work would take. But again there was combined with what would now be called the law governing the administrative process much of what would now be termed public administration. It included such chapter headings as "Term and Tenure of the Heads of Departments," "Organization of Executive Department," "History of Rural Local Administration," "Municipal Organization in the United States," and "Qualification for Office." Another point of difference, and one that could perhaps fairly be termed a weakness, was his emphasis on the constitutional aspects of administrative law. While the emphasis was not as pronounced as that given it by later scholars,<sup>11</sup>

<sup>5</sup> Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403 (1894).

<sup>6</sup> See the discussion of Felix Frankfurter and Freund, pp. 760-63 *infra*.

<sup>7</sup> FREUND, *CASES ON ADMINISTRATIVE LAW* at v (1928).

<sup>8</sup> GOODNOW, *CASES ON GOVERNMENT AND ADMINISTRATION* (1906).

<sup>9</sup> GOODNOW, *CASES ON THE LAW OF OFFICERS—INCLUDING EXTRAORDINARY LEGAL REMEDIES* (1906).

<sup>10</sup> GOODNOW, *PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905).

<sup>11</sup> See pp. 760-63 *infra*.

the contrast becomes evident when Freund's total exclusion of constitutional law from administrative law is examined.<sup>12</sup> In 1912 Thomas Reed Powell concluded that, while Goodnow pioneered the study of administrative law for students of government, Freund opened the field for students of law.<sup>13</sup>

The correctness of this conclusion becomes clear when Freund's early writings are examined. It is significant that his earliest writings on administrative law were done in the journal of a discipline other than law.<sup>14</sup> Administrative law was not "law" in the minds of the great majority of lawyers and legal scholars, nor would it be so considered by many for years to come.

Two works contain the major contributions of Freund to the definition, scope, and content of administrative law. These books are *Cases on Administrative Law*,<sup>15</sup> the first edition of which appeared in 1911, and *Administrative Powers Over Persons and Property*,<sup>16</sup> which appeared toward the end of his life. The first of these volumes was to exert an influence upon the study of administrative law that is difficult to overemphasize. It was the first casebook published in the field of administrative law and remained the only one until 1932.<sup>17</sup> Whether the unique position of the casebook was due to a general consensus that it was so superlatively done that no other work was necessary, or whether at that time there was so little demand for casebooks on administrative law that no one else cared to construct one, is hard to determine. Freund's contemporaries seemed to think the former alternative more nearly approached the truth. While only one law review took note of this book, the reviewer, Thomas Reed Powell, had a prophetic view of the role it was to play. His first paragraph indicated much of the contemporary skepticism towards the new discipline that was just beginning to claim the name of "law":

The study of administrative law is indebted to this compilation of Professor Freund's for a service even more important than that rendered to the law of trusts by the case-book of Dean Ames. The subject matter of the collection still receives but slight recognition in the law school curriculum. Those who concede its existence as a separate field of study disagree as to its scope and content. There is still room for the work of a pioneer. Professor Goodnow has blazed the trail and made straight the way for the student of government. Professor Freund's interest seems to lie more particularly in developing the subject from the point of view of individual private right. His selection and arrangement of cases merits unqualified approval

<sup>12</sup> See FREUND, *CASES ON ADMINISTRATIVE LAW* (1911).

<sup>13</sup> Powell, Book Review, 12 COLUM. L. REV. 570 (1912). See also Vandebosch, Book Review, 17 KY. L.J. 81 (1928).

<sup>14</sup> Freund, *Private Claims Against the State*, 8 POL. SCI. Q. 625 (1893); Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403 (1894). See Part II *infra*.

<sup>15</sup> FREUND, *CASES ON ADMINISTRATIVE LAW* (1911).

<sup>16</sup> FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* (1928).

<sup>17</sup> The Frankfurter and Davison casebook, *CASES ON ADMINISTRATIVE LAW*, was published in 1932.

not only because it provides an admirable case-book for the class-room and thus promotes the study of an important subject, but because it aids materially in securing a more definite conception of what are still ill-defined categories of legal principles.<sup>18</sup>

Walter Dodd of Yale, writing for what was then the combined law review for the University of Chicago, Northwestern University, and the University of Illinois, underscored the book's significance as seen from the perspective gained by seventeen years between editions:

The author of this volume is primarily responsible for the attention now given to the important problems of administrative law in law schools of this country. His volume of "Cases on Administrative Law," recently issued in a second edition, has determined the scope of law school courses in this field; and his activities as Chairman of the special committee on administrative law and practice of the Commonwealth Fund have largely determined the character of special investigations in this field. By the present volume he has still further increased the debt which all students of our legal system owe to him.<sup>19</sup>

Others have joined in attributing the beginning of study of administrative law in the law schools primarily to this casebook.<sup>20</sup>

The first paragraph of Freund's book vividly shows what the author was struggling with; it shows a keen mind trying to strike to the heart of the administrative process. It shows his perception of a common element in a host of problems at that time largely ignored in the curriculums of the law schools or fragmentized into many classes:

The subject of administrative law covers a number of topics, which in treatises and digests are generally divided between the law of public officers and the law of extraordinary legal remedies, but which will also be found treated incidentally under such various heads as municipal corporations, taxation, highways, elections, intoxicating liquors, nuisances, public health, public lands, etc.

The common element, which gives the subject its unity, is the exercise of administrative power affecting private rights, and the term "administrative law" . . . [is] the best designation for the system of legal principles which settle the conflicting claims of executive or administrative authority on the one side, and of individual or private rights on the other.<sup>21</sup>

<sup>18</sup> Powell, Book Review, 12 COLUM. L. REV. 570 (1912).

<sup>19</sup> Dodd, 23 ILL. L. REV. 623 (1929). The Commonwealth Fund, referred to by Dodd, set aside funds for legal research in 1920. The Chairman of the Legal Research Committee was James Parker Hall, Dean of the University of Chicago Law School, and included such men as Max Farrand, Benjamin Cardozo, Roscoe Pound, Harlan F. Stone, and Charles Evans Hughes. The special committee on Administrative Law and Practice consists of Freund as Chairman, with Walter L. Fisher, a prominent Chicago attorney, Felix Frankfurter of Harvard, and Frank Goodnow, then President of Johns Hopkins.

<sup>20</sup> See, e.g., Kent, *Ernst Freund—Jurist and Social Scientist*, 41 J. POL. ECON. 145, 150 (1933).

<sup>21</sup> FREUND, CASES ON ADMINISTRATIVE LAW 1 (1911).

The table of contents of this early casebook indicates how meticulously Freund avoided intermixing the fields of constitutional law and administrative law. He did not discuss the separation of powers or delegation of powers, as Frankfurter was later to do to so extensively. To Freund, administrative law did not serve as another vehicle for the study of constitutionalism. He launched directly into a study of the administrative process. No one would expect that the subject matter discussed in 1911 would be the same as that discussed in a casebook written in 1962, particularly after the growth of the administrative process in the 1930's. However, the emphasis upon the study of the administrative process rather than upon constitutional problems involving administration is today the most modern, the most realistic, and the most useful approach.<sup>22</sup> This approach to the study of administrative law—which may as accurately be termed a definition of what constitutes administrative law—was abandoned in the early 1930's with the advent of the second major casebook on administrative law.

The emphasis of the study of the administrative process was continued in the second edition of Freund's casebook in 1928. Fewer pages were devoted to extraordinary remedies; one chapter was devoted exclusively to the injunction, for it was becoming apparent that that remedy would be the most important of the extraordinary remedies. Recognition of the contributions of this casebook to administrative law was widespread. A reviewer commented that one of Freund's early assertions, namely, that the law to be studied is that which controls the administration rather than that law which is produced by the administration, had now gained full acceptance.<sup>23</sup> Almost all the reviewers commented on the advisability of rigorously separating constitutional law from this field.<sup>24</sup>

The second major volume written by Freund was *Administrative Powers Over Persons and Property*, published in 1928. This volume reveals the influence of Freund's continental education and at the same time brings into sharp focus the difference between his approach and that of Goodnow. This work was the first empirical study of the administrative process as a device to con-

<sup>22</sup> "The three large segments of administrative law relate to transfer of power from legislatures to agencies, exercise of power by the agencies, and review of administrative action by the courts. As recently as a quarter of a century ago, the subject was still largely limited to the first and third of these, with concentration upon the doctrines of separation of powers and non-delegation. But as of the middle of the century, the theory of separation of powers, while still guiding the drafters of constitutions, has hardly any influence upon administrative arrangements or activities. The problems of delegation are tending to disappear from federal law and are of sharply diminishing importance in state law.

"The heavy emphasis is now upon the administrative process itself—rule making and adjudication, and such incidental powers as investigating, supervising, prosecuting, advising and declaring." DAVIS, *ADMINISTRATIVE LAW: CASES-TEXT-PROBLEMS* 2 (1960).

<sup>23</sup> Reed, Book Review, 28 MICH. L. REV. 223 (1929).

<sup>24</sup> Laube, Book Review, 14 CORNELL L.Q. 261 (1929); Nichols, Book Review, 24 ILL. L. REV. 740 (1930); Vandenbosch, Book Review, 17 KY. L.J. 81 (1923).

trol the public, while much of Goodnow's writing was an internal examination of public administration coupled with studies of the law of public officers and extraordinary remedies.

While Freund specifically disclaimed any belief that this work constituted a systematic treatise on administrative law,<sup>25</sup> several reviewers maintained that it came closer to that than any other volume then in print.<sup>26</sup> The author compared the statutory law on the administrative process in England, Germany, New York, and the United States. Freund felt that legislation was becoming an even more important factor in the development of administrative law than the courts. His approach was foreign to the inclinations of a scholar with only a common law background.

Freund attempted to define and categorize the various aspects of the administrative process. He began by dividing the field of administration into "service" powers and "control" powers. He observed that fundamental constitutional limitations upon government operate more weakly where government is performing a "service" (e.g., aid to state roads, mail distribution) than where it furnished "control" (e.g., child labor laws). After confining his study to "control" powers only, he further delimited it by excluding powers of a "functional status" (appointment and removal of officials) and "non-determinative" powers (powers which do not determine private rights). This left "determinative" powers as the object of his study. These he divided into "enabling" and "directing" powers, the licensing power being an example of the former, the rate-fixing order typifying the latter. Freund concluded that the "directing" power resembled the judicial power and was consequently more controversial when employed by administrative agencies. While the terminology has not survived, much of his classification of phenomena of the administrative process has remained, largely because of the penetrating analysis of what was actually being done. By emphasizing the study of the administrative process, Freund provided an acute insight into the needs of the emerging discipline and expressed a view more in harmony with the needs of administrative law today than some who were to follow.

The first casebook published after Freund's was edited by Felix Frankfurter and J. Forrester Davison in 1932.<sup>27</sup> The theme of this casebook becomes evident from its interesting introduction. Long quotations from Aristotle, Locke, Montesquieu, Farrand, Jefferson, Maitland, Elihu Root, Calvin Coolidge, and others on the broad problems of constitutionalism and the separation of powers are included. After a dedication to "Ernst Freund—

<sup>25</sup> FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* at vii (1928).

<sup>26</sup> Cheadle, Book Review, 15 CORNELL L. Q. 507 (1930); Dodd, Book Review, 23 ILL. L. REV. 623 (1929); Patterson, Book Review, 29 COLUM. L. REV. 101 (1929). Kent said that this work was the "most important effort that has been made to provide a classification and terminology adequate to reduce this new and amorphous subject to some kind of rational order." Kent, *Ernst Freund—Jurist and Social Scientist*, 41 J. POL. ECON. 145, 151 (1933).

<sup>27</sup> FRANKFURTER AND DAVISON, *CASES ON ADMINISTRATIVE LAW* (1932).

Pioneer in Scholarship," the book proceeds to redefine the boundaries that he had set for administrative law. The book is divided into three parts, part one entitled "Separation of Powers," part two "Delegation of Powers," and part three "Judicial Control of Administrative Action." Parts one and two embrace problems of constitutional law not dealt with by Freund. The first part deals primarily with the constitutional status of the judiciary, while the second part deals with the role of the executive in the legislative process. Only in part three do the authors treat problems that could be considered uniquely administrative in nature, and even in this part the focus of the authors was upon constitutional aspects of administrative law.

This preoccupation with constitutional problems was applauded by Paul L. Sayre, who had the unique opportunity to study under both Frankfurter and Freund.<sup>28</sup> Sayre felt that the constitutional emphasis of Frankfurter and Davison would be the trend of the future. He observed that their casebook was "dominantly one of the constitutional law aspects of administrative law . . ." and that Freund's was "very different" in that "he was not concerned about the heights of constitutional law."<sup>29</sup> He referred to Frankfurter's flight to the "peaks" of constitutional law and suggested that Freund was content to dwell in the "valleys" of the administrative process. In this comparison of the two approaches to the definition of administrative law, Frankfurter definitely emerges as the leader to whom future scholars should refer.

In reviewing the new casebook for the *Harvard Law Review*, Freund, in the year of his death, proved to have the more accurate view of the trend of the future.<sup>30</sup> He observed that two-thirds of the casebook dealt with constitutional problems and commented that "it cannot be said that the selection or arrangement of the cases fulfills the expectations aroused" by the prefatory remarks.<sup>31</sup> He asserted that if administrative law were to establish itself as a separate area of the law, deserving of a name and a literature, it had to carve out an area more uniquely its own. Freund recognized the relevancy of questions concerning the proper scope of legislative delegation, but felt that these would not be the pressing problems of the future. The curriculums of law schools, he said, already exposed the students to an abundance of such writings and offered very little opportunity to "become acquainted with the technique of administrative powers in their nonconstitutional aspects. . . ."<sup>32</sup> He then made a striking statement which at once suggested a reason for Sayre's misjudgment and correctly pointed the way for the future:

To teachers and students alike a well-considered and well-written discussion of a constitutional problem generally appears as the last word of juristic performance, and the reviewer acknowledges the spell exercised by some of the very decisions in the present collection, the permanent value

<sup>28</sup> Sayre, *A Common Law of Administrative Powers*, 18 IOWA L. REV. 241 (1933).

<sup>29</sup> *Id.* at 242.

<sup>30</sup> Freund, Book Review, 46 HARV. L. REV. 167 (1932).

<sup>31</sup> *Id.* at 168.

<sup>32</sup> *Id.* at 169.

of which he is strongly inclined to regard with skepticism. His attitude of doubt with reference to the editor's heavy commitments in the way of constitutional cases is due to the feeling that they involve serious losses in other directions, and that it is largely owing to lack of space that the non-constitutional side of administrative law receives such relatively meager treatment.<sup>33</sup>

In support of Professor Frankfurter's approach it may be noted that many problems in administrative law today are still concerned to some degree with constitutional questions such as the right to a hearing. But the constitutional issues that so enthralled Frankfurter centered around the separation and delegation of powers, issues having only peripheral relevance to administrative law. It may be asked whether Professor Frankfurter might not have been right in including a discussion of such problem, at that time in American history, the time of the Great Depression, even though such topics might not be appropriate in either 1911 or 1962. It must be remembered, however, that this book was published in 1932, before the New Deal legislation clashed with the Supreme Court on these very issues. Regardless of the timeliness of a discussion of the basic issues of constitutional government, the context in which the topic was presented, namely administrative law, would seem to be improper.

The next substantial advance in defining administrative law was produced by the contributions of E. Blythe Stason, Professor of Law and later Dean of the law school at the University of Michigan. An examination of his casebook shows that the definition of administrative law was shifting toward Freund.<sup>34</sup> Even though published squarely in the middle of the controversy between the New Deal and the Supreme Court, little emphasis was put upon constitutional aspects of administrative law. The table of contents makes this clear. With the writing of Walter Gellhorn, Professor of Law at Columbia University, the trend away from constitutional interpretation of administrative problems became even stronger. In the 1940 edition of his casebook,<sup>35</sup> Gellhorn reversed Professor Frankfurter's apportionment by devoting only 200 pages to the separation and delegation of powers, and over 800 pages to an analysis of the administrative process. In the 1947 edition of Gellhorn's casebook, the heading "separation of powers" was dropped and less than one-tenth of the book was devoted to constitutional problems. By 1960, with the publication of Kenneth Culp Davis' casebook,<sup>36</sup> this trend would seem to have been completed. There, less than twenty pages are included—mainly to explain why the problem of delegation of power is not really a problem of administrative law.

It would be an overstatement to say that the casebooks of Professors

<sup>33</sup> *Id.* at 170.

<sup>34</sup> STASON, *CASES ON THE LAW OF ADMINISTRATIVE TRIBUNALS* (1936).

<sup>35</sup> GELLHORN, *ADMINISTRATIVE LAW—CASES AND COMMENTS* (1940).

<sup>36</sup> DAVIS, *ADMINISTRATIVE LAW: CASES-TEXT-PROBLEMS* (1960).



Stason, Gellhorn, and Davis are the fruition of the work of Freund. The many changes in the administrative process demanded original and creative analysis by these later scholars. But at least the direction of the study of administrative law and the basic definition of what it consists, as established by Freund, were continued by these men.

To note the importance of constitutional issues, as did Sayre and Frankfurter, should not lead to the conclusion that these are central to the study of administrative law. From two standpoints this would seem to be the wrong approach: First, the topic is already covered by existing courses in constitutional law. Merely to teach the same subject-matter from a different viewpoint is hardly profitable in the extremely compressed yet fragmentary curriculum of the law school. Second, one must descend from the "peaks" that Sayre mentions and delve more deeply into the administrative process to gain a complete understanding of the problems.

What would seem to be needed would be more of the work proposed by Freund: empirical studies of specific aspects of the administrative process. Jefferson and Montesquieu may provide historical perspective as to where we have been and where we want to go. But such an approach is valueless without a knowledge of precisely where we are now. This can only be accomplished by the Freund approach to the study of administrative law—a minute and often tedious examination of the administrative process.

### III. ADMINISTRATIVE LAW AS A LIBERAL ART

As noted, it is not without significance that the early writing of Freund in the field of administrative law was done in the journals of disciplines other than the law.<sup>37</sup> The struggle to have this subject accepted as a separate and legitimate branch of the law was integrally connected with the general attempt to liberalize the curriculums of leading law scholars. At the turn of the century the Harvard Law School, under the leadership of Dean Ames, continued to exclude from its curriculum any topic not considered to be "pure law."<sup>38</sup> Subjects infected with aspects of the liberal arts were banned from the curriculum, and borderline subjects were relegated to graduate classes or seminars. William R. Harper, the first President of the University of Chicago, had tenta-

<sup>37</sup> See articles cited note 14 *supra*.

<sup>38</sup> Looking back over Harvard's experience, Professor Samuel Williston wrote:

"Doubtless we were somewhat narrow and shortsighted in the nineties and in the early years of this century.

"It will seem strange today that the Faculty of the School was unwilling to have a professor of International Law appointed although a fund left by George Bemis to support the professorship had been accumulating for years. Edward Strobel was elected by the Corporation to the professorship in 1898 without the approval of the faculty. And though the Corporation had its way in his election, the Faculty really won the victory, if victory it can be called, for Strobel's courses on International Law were never allowed credit for a degree. International Law was not law, said Professor James B. Thayer; 'it has no binding force and we are training young men for a practical profession.' " HARV. L. BULL. 5 (1948).

tively arranged with the Harvard Law School to establish some sort of paternalistic arrangement between Harvard and the proposed law school at Chicago. It was believed that the mid-West needed a school of comparable quality to Harvard. Arrangements were made for one of Harvard's most brilliant professors, Professor Beale, to come temporarily to Chicago in 1902 to be the first Dean of the law school. During the course of negotiations, Professor Freund was sent to Harvard to discuss his proposed curriculum with Dean Ames and Professor Beale. After this meeting, Dean Ames wrote the following letter, dated March 31, 1902, to President Harper:

DEAR DR. HARPER:

Professor Beale and I found Professor Freund a very likable man, but I must confess that our interviews with him have given me serious misgivings as to the wisdom of the plan of having Mr. Beale go to Chicago, even temporarily as Dean of your new Law School.

I have in all my talks with you spoken without reserve, and I feel bound to write with equal frankness now.

I understood it to be your wish and purpose to establish at your University a law-school resembling as closely as possible in its curriculum, methods of study, and quality of its Faculty, the Harvard Law School. Do not understand me as believing now that this is not still your wish and purpose. But knowing your high estimate of Professor Freund, and having discovered how widely his conception of your new School differs in fundamentals from our School, I feel that before further steps are taken we ought to clear away all possibility for any subsequent misunderstanding and disappointment. To this end I cannot do better than mention the main differences between Professor Freund's conception of a law-school and our ideas of a law-school.

First, as to the curriculum—Professor Freund suggested that 2/9 of the work leading to the degree should consist of subjects belonging properly in the departments of Political Science or Sociology. We have no such subjects in our Curriculum and are unanimously opposed to the teaching of anything but pure law in our department. Nor would the transfer of such subjects to a post-graduate year in the School accord with our conception of the true function of a law-school.

Secondly,—Professor Freund would admit to the Law Faculty, the professors who teach these subjects of Political Science and Sociology and also the professors who are to give the instruction in the prae-legal year preparatory to the law course. We think that no one but a lawyer, teaching law, should be a member of a Law Faculty. I will not undertake to say in what department of your University the prae-legal year should be placed, but it would be altogether foreign to our ideas to have it in the Law School. We believe the success of our School is due in no small degree to the solidarity of our Faculty and to its concentration upon the work of teaching the law pure and simple.

Thirdly,—The method of study. Our School is conspicuous for its belief in the learning of law by the systematic study of Cases. If Professor Beale

is to be Dean with the purpose of reproducing the Harvard method, he must have a Faculty that believes in that method. Whether Professor Freund is convinced that that is the true way of studying law I do not know. I did not ask him his views on that point. Certainly his belief in the general methods of the German Universities, and his general views as to the function of a law-school would predispose him against a thoroughgoing belief in us or our methods. Professor Mechem as a law-teacher, is also, to me, an unknown quantity. I cannot think it wise, therefore, that Professor Beale should subject our School to the loss of his teaching, until he is assured that he is to have a body of colleagues who will support him loyally because of their belief in him and his methods.

....

I have talked of course, with President Eliot since Professor Freund's visit. He and the other members of the Corporation agree that it is not for the interest of this School that Professor Beale should have the proposed leave of absence unless you desire him for the purpose of establishing with his new colleagues, a School like ours, that is a School with a curriculum of pure law, with a Faculty made up exclusively of professors, who are lawyers, approved by him and believing in Harvard standards and Harvard methods.

Bearing in mind your statements that Chicago lawyers regard our methods with distrust, and that the lawyers on your Board of Trustees, in particular, do not believe in us, and knowing your high estimate of the probable influence and effectiveness of Professor Freund in the proposed Law Faculty, I can readily understand that, whatever may be your personal inclinations, you may, upon reflection, deem it inexpedient to invite Professor Beale to come to you upon these terms.

....

Should you decide not to invite Mr. Beale after reading his letter and one from him to be written as soon as he receives the formal answer from the Corporation as to leave of absence, I need hardly say, that we shall be quite content. Nor shall we lose our interest in your School. On the contrary we shall watch its development under favorable auspices, upon lines different from ours, with the hope that it may not only achieve a distinct success, but that it may throw new light upon the problem of legal education.<sup>39</sup>

*signed, JAMES BARR AMES.*

<sup>39</sup> Letter from James B. Ames, Dean of the Harvard Law School, to William R. Harper, March 31, 1902, on file in the Archives of the University of Chicago.

This statement of the aims and content of a legal education should be compared with that given by T. J. Lawrence in his "Memorial on the Creation of a Law School in the University of Chicago," on file in the Archives of the University of Chicago: "The proposed Law Department must aim at something more than the preparation of its students for practice. It must make legal studies into an instrument of liberal education. Unless they can be so used they have no place in the University *curriculum*. But there need be little real difficulty in adapting them to the wants of those who seek culture as well as professional knowledge. Such persons will desire to become acquainted with the history of their subject, with the scientific analysis of legal conceptions and with the ideals at which law should aim, as well as with the technical rules which govern the cases that will come before them in their daily

This letter was followed on April 2, 1902, by a letter to President Harper from Professor Beale, reiterating the main points of the letter of Dean Ames:<sup>40</sup> the distrust of the heretical views on legal education of Freund; the necessity of a faculty composed completely of "persons who teach *law* in the strict

work. They will, therefore, be willing to spend more time in the study of law than is absolutely necessary in order to gain a bare qualification for practice. It should be the object of the University of Chicago to give such students as these a training that will enable them to become leaders of the bar and ornaments of the bench, inspiring teachers, scientific writers and wise reformers, rather than to produce the greatest possible output of eager youths, quick to pick up professional technicalities and careless of aught beyond professional emolument."

<sup>40</sup> Dean Beale's letter to Dr. Harper:

"MY DEAR DR. HARPER:

The Corporation granted me leave of absence to become Dean of the new law school 'provided that the School to be established at Chicago is to have ideals and methods similar to those of the Harvard Law School.' They intended to make my going conditional upon such a school being established. An explanation of this vote is necessary.

"You will remember that we consented to the inconvenience of my leaving at this time solely that I might help you establish a school on the model of the Harvard Law School. Except for this purpose (which we believe to be for the benefit of legal education) we should not have considered your proposition. The Corporation have taken the same view.

"We were perhaps not quite justified in supposing that at our second interview you had in mind a school in all respects like ours. But you still desire, I suppose, one so nearly like it in spirit, in scholarship, and in curriculum that as you suggested, the students of the two schools might (if such an arrangement could be made) pass from one to another without loss of time; and you wish to carry on in Chicago the same sort of work, and hope for the same measure of success as ours.

"We should have assumed that everybody in Chicago was of the same mind, if it had not been for the ideas Mr. Freund expressed here. I dislike to speak of this matter, because Mr. Freund personally made such an agreeable impression upon me; but it is best to be frank at the outset. He seemed to be cognizant of your plans for a school, and what he had in mind was absolutely opposed to our ideas and methods. I could be of no use in such a school.

"Let me state, as I understand it, the fundamental plan of the Harvard Law School.

"We take a student for three years, and demand all his time. We permit him to do no serious work outside the strictly legal subjects we teach. We require of him no more work than the average student can do faithfully; and we intend the faculty to do no more work than is consistent with unimpaired elasticity of mind, interest, and energy. We thus keep the student's interest keen, and we make sure that everything he studies shall be thoroughly mastered. The faculty determines in the first instance all matters of general policy within the school, and is composed solely of persons who teach *law* in the strict sense of the word. We think that experience justifies us in believing that in this way alone we can turn out thoroughly trained men, fit at once to enter upon the practice of a learned and strenuous profession.

"Such a school as Mr. Freund has in mind differs from ours in almost every one of these particulars.

"He wishes to put into the three-year course certain subjects which are not law in any sense, and to that extent to diminish the time and thought devoted to the study of law. This is a very serious matter, and one which I regard as of radical importance. He wishes to require of the student more work than seems to me wise; and of the teacher more than he can do, year after year, without becoming dry and uninteresting. The legal courses which he has in mind are different in length from the courses given in the best schools. The length of a 'course' is to be sure largely an arbitrary thing; but the fact that the Schools have arrived at a tacit agreement in the matter suggests that the law is most naturally taught in that way. In all the schools which are similar to ours there is a typical 'course' of about 60

sense of the word"; the faculty entirely composed of lawyers; and strict adherence to the case method. Beale complained of Freund's views on the number of credit hours the latter was demanding from the law student. Harvard had a maximum load of ten quarters hours, while Freund proposed considerably more. Beale then made an interesting observation about the Columbia Law School:

A notable exception is the Columbia Law School, where the students have fourteen hours a week, and some of the teachers over nine hours. The cur-

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hours (though in some schools there are in particular cases variations from this length). In most of the same schools the teacher's work is six hours a week, and that of the student ten hours. A notable exception is the Columbia Law School, where the students have fourteen hours a week, and some of the teachers over nine hours. The curriculum of that school also includes a few non-legal electives from the School of Political Science. These facts have been suggested as accountable for the striking failure of the school to take the position to which her location, her wealth, and the ability of her faculty seem to entitle her.

"These differences of view are so fundamental that it is obviously necessary to choose one conception of the school or the other. I cannot spare the time to go from here and teach a short time in a school which I do not believe to be wisely organized; nor if I am to introduce Harvard methods in parts of two years, with the bench and the trustees lukewarm, can I accomplish anything unless the faculty is in hearty sympathy with the plan.

"I believe thoroughly, as I told you, in academic freedom, and would by no means wish to dictate methods of teaching to any man deemed worthy of an appointment to the faculty; but every teacher must be in hearty sympathy with the ideals and aims of the school, and no one should, I think, be called to teach who does not express such sympathy. Where so many good law schools exist, a school can stand at the head only by doing as well as possible everything it has to do. It is not enough to get good teachers and good students; the teachers must at all times be able to give their best efforts to teaching, and all must pull together. If the plan of the school is to be such as I approve, all the other teachers should approve it; if not, I must not be there to create discord.

"The matter comes to this, then. In accordance with the vote of the Corporation, I must ask for distinct and definite assurances on the following points before accepting the honorable appointment you offer me.

1. That no subjects shall be taught in the School or counted toward the degree but strictly legal subjects. The degree shall be given only after a three-years study of such subjects.

2. That the policy of the school shall be formulated in the first instance by a faculty consisting *only* of lawyers. Of course I do not mean that the faculty shall be independent of trustees or other governing bodies, but that it shall not be filled with men who are not lawyers, and have had no experience as teachers in a law school.

3. That no person shall teach in the school who does not frankly concur in adopting for the school the spirit and the methods of the Harvard Law School.

4. That you yourself will heartily support me in the effort to establish in your new school ideals and methods similar to those of the Harvard Law School.'

"Pray do not regard me as seeming in any way to dictate your policy. If on reflection and inquiry you do not believe it wise to commit Chicago to such a policy, I shall with entire satisfaction remain here and do what I can to help you,—I couldn't help you by joining your faculty. But you will, I feel sure, agree that it is better for us to have an absolutely full and frank understanding at the outset.

"As soon as I get your answer, if you wish still to have me at the head of the only kind of school I could teach in, I shall be able to go on to Chicago, meet the other members of the faculty, and discuss details of the organization.

Very sincerely yours,

JOSEPH H. BEALE, JR. [signed]"

riculum of that school also includes a few non-legal electives from the school of Political Science. These facts have been suggested as accountable for the striking failure of the school to take the position to which her location, her wealth, and the ability of her faculty seem to entitle her.

He then listed the above-mentioned conditions as prerequisites to coming to Chicago as Dean.

The two main fears of Ames and Beale were revealed in a letter, dated April 7, 1902, from Beale to Freund.<sup>41</sup> Beale reported that:

Ames was more disturbed than I by what he (and I) consider your heretical views about law. The hard fight which he and Mr. Langdell had in this faculty several years ago made him anxious that I should not meet a similar difficulty.

Beale said that he feared two things most: First, an assault upon the case method of legal instruction; and second, the deleterious effects upon "pure law" if the heresies of "political science men" were allowed in the law school: "The faculty might be made up largely of political science men . . . The very eminence of Professor Judson and the others would give their ideas overpowering weight."

It is obvious from the writings and casebook of Freund that he did believe in the case method of study. What he suggested was nothing that today seems so heretical: the effectiveness of the case method of legal instruction begins to decline about the middle of the student's second year.<sup>42</sup> Such views, though radical at the time, are today held by some of the leading American scholars.<sup>43</sup> The proposed curriculum,<sup>44</sup> injecting "political science"

<sup>41</sup> Letter from Joseph H. Beale, Jr. to Ernst Freund, April 7, 1902, on file in the Archives of the University of Chicago.

<sup>42</sup> Van Hecke, *Ernst Freund as A Teacher of Legislation*, 1 U. CHI. L. REV. 92, 93 (1933).

<sup>43</sup> Although few educators would deny the effectiveness of the case method of legal instruction, the extreme position taken by editors of some casebooks in excluding textual materials is now being attacked. For example, in Davis, *Administrative Law: Cases-Text-Problems*, preface, at x, the author states that: "ingenious editors, searching for the most effective ways to maximize student understanding, discover time and again that the best form for particular material is textwriting. But they refrain. Or they curtail. They find a case. Or they find someone else's words to set out. When they yield to their own best judgment and write some text, they often cramp it into the style of a note. And more often than not, no matter what its merit for education, they print it in small type. They fear the anti-text bias. So powerful a force is the anti-text bias that hardly anyone dares to attack it openly.

... "The unsound factor behind the anti-text bias is the erroneous belief that textwriting is not for training the mind but is only for informing the mind. Let me say that again. Let me shout it in italics: *The notion that textwriting is not for training the mind but is only for informing the mind is a misunderstanding, and a thoroughly pernicious one.*"

For another example of a case book constructed to permit full use of both text and cases, see GREGORY & KALVEN, *CASES AND MATERIALS ON TORTS* (1959). A reviewer observed: "Teachers accustomed to the usual parade of cases followed by rather spare footnotes may be struck by the editors' extensive resort to excerpts from the periodical literature. . . .

"Another prominent feature of the editors' method of presentation is the constant prac-

into the "pure law" of the usual legal curriculum,<sup>45</sup> sounds much like the liberal law school of today. The first year consisted of traditional law subjects, with only one class that deviated from the "pure law" system, a class in international law by Professor Judson of the Political Science Department. During the next two years, the usual courses offered at the better law schools were to be available, with a class in administrative law to be offered by Professor Freund. The classes objectionable to Beale and Dean Ames were criminology, finance, railroad transportation, accounting, the relation of the state to industry, banking, municipal sociology, experimental psychology, and others of a like nature.

In the end, Beale came to Chicago to become one of the great Deans in the school's history. Instead of the seemingly inevitable clash between the views of Beale and those of Freund, the technical brilliance of Beale merged with the liberalism and vision of Freund to produce a happy blend of rigorous technical proficiency and far-sighted curriculum. While close ties were established with Harvard, Freund retained a good portion of his proposed curriculum. His class in administrative law offered to second and third year students, though not the first to be regularly taught in a law school in this country, was second only to a class offered by Goodnow at Columbia at the early date of 1892.<sup>46</sup> Classes in international law by men from the Political Science Department were offered, along with a class in "systematic and comparative jurisprudence." Some classes such as "relation of state to industry" and "railroad transportation" were not allowed.

This pioneering work to liberalize the curriculum of law schools led to the introduction of administrative law into the leading law schools. As mentioned, Columbia had led the way with a class in administrative law in 1892.<sup>47</sup> Chicago was next introducing a class in administrative law for second- and third-year students in 1902, the first year of the law school's existence.<sup>48</sup> At

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tice of following each decision with probing editorial inquiries. . . ." Malone, Book Review, 28 U. CHI. L. REV. 391, 391-92 (1961).

<sup>44</sup> Proposed Curriculum of Ernst Freund, on file in the Archives of the University of Chicago.

<sup>45</sup> Professor Davis has noted that: "The area most in need of original research is the one that has been most neglected—the political science aspects of the regulatory process. . . . The need is for studies designed to provide an empirical basis for increasing administrative effectiveness in accomplishing the objectives of regulatory legislation. To what extent are legislative choices nullified by administrative failures? To what extent do the regulated groups control the regulators? To what extent, if at all, do regulatory agencies effectively represent an otherwise unprotected public interest?" Davis, *Reflections of a Law Professor on Instruction and Research in Public Administration*, 47 AM. POL. SCI. REV. 728, 748-49 (1953).

<sup>46</sup> COLUMBIA COLLEGE HANDBOOK OF INFORMATION 1892-93.

<sup>47</sup> *Ibid.*

<sup>48</sup> The course, offered in alternate years, was not actually taught until 1903. The *Law School Announcement* contains an interesting description of the course: "Administrative

Yale, a class in "extraordinary legal remedies," comprising a large part of some of the early courses in administrative law, was offered as early as 1903-04.<sup>49</sup> By 1917-18, administrative law still was not available to the Yale law student in the three-year curriculum leading to the LL.B., but in 1917 a class in "administrative law and public officers" was offered to graduate students working for the degree of Master of Laws, Doctor of Law, and Doctor of Civil Law. This course was taught by Professor Borchard and used as texts Freund's *Cases on Administrative Law* and Goodnow's *Comparative Administrative Law*. In 1918-19, a class in administrative law was available at Yale for the first time with credit applicable to the LL.B. degree. At Harvard, administrative law was first available in 1911-12 as a graduate class taught by Professor Wyman. This continued until 1915, when Professor Frankfurter taught the class. In 1929, on the eve of the greatest expansion of the administrative process in our history, Harvard reduced this graduate course, taught only every other year, to a seminar. Although it was not a lecture class, one compensating factor existed in that the seminar was open to undergraduates. Not until 1939 was a lecture course again available at Harvard, and then only as a graduate course. It was not until 1941-42 that Harvard offered a lecture course in administrative law with credit available to the student working toward the LL.B. degree.<sup>50</sup>

#### IV. SUBSTANTIVE VIEWS

##### A. *The Administrative Process—A Necessity.*

The administrative process has been one of the favorite scapegoats for this nation's ills. Erroneously assuming that the administrative process has a political complexion of its own, politicians and jurists have attacked it as being socialistic,<sup>51</sup> communistic,<sup>52</sup> and unnecessary.<sup>53</sup> While such of the criticism seems to come from the uninformed,<sup>54</sup> a distressing amount comes

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Law. Judicial control of administrative acts; administrative regulations; administrative determinations; due process and conclusiveness; powers in aid of execution of laws; enforcement of statutes." CIRCULAR OF INFORMATION 10 (1902-03).

<sup>49</sup> CATALOGUE OF YALE UNIVERSITY (1903-04).

<sup>50</sup> HARVARD UNIVERSITY CATALOGUES (1911-1942).

<sup>51</sup> BECK, OUR WONDERLAND OF BUREAUCRACY (1932). See note 54, *infra*.

<sup>52</sup> Roscoe Pound, then chairman of an American Bar Association committee on administrative agencies, referred to "administrative absolutism" as a doctrine which was making great headway "in American institutions of learning. . . ." He said that this was "a Marxian idea much in vogue just now among a type of American writers." 63 A.B.A. REP. 331, 339-40 (1938).

<sup>53</sup> HEWART, THE NEW DESPOTISM (1929); 59 A.B.A. REP. 539 (1934).

<sup>54</sup> "Uncle Sam has not yet awakened from his dream of government by bureaucracy, but ever wanders further afield in crazy experiments in state socialism. Possibly some day he may awaken from his irrational dreams, and return again to the old conceptions of government as wisely defined in the Constitution of the United States." BECK, *op. cit. supra* note 51, at ix.



from those who should know better.<sup>55</sup> While much of this was a reaction to the revolutionary development of the administrative process made necessary by the depression of 1929, extreme distrust of the process is still evidenced, for example, by the recommendations of the Task Force on Regulatory Commissions of the Second Hoover Commission.<sup>56</sup>

In this regard, the views of Ernst Freund, expressed as early as 1894,<sup>57</sup> may seem more appropriate for our age. He observed that the growth of the administrative process was inextricably linked to the increasing complexity of modern society and the changing concept of the function of government. In speaking of the need for an expansion of the administrative machinery in the state governments, he said in 1894:

It is a different question, and one as to which speculation is more justifiable, how far the present administrative system of the American states will be able to retain its peculiar features unimpaired, in view of the constant and inevitable expansion of the sphere of modern state activity. This must extend the province of administration as well as of legislation. Our system is the product of an extreme democratic spirit, combined with a comparative simplicity of the conditions of government in the early history of the states. The spirit of democracy seems at the present time to seek different methods of asserting itself from those chosen in the first half of the century; and simplicity must necessarily give way to more complicated conditions with the progress of material civilization. The purpose of the framers of our state constitutions appears to have been to keep the government as weak as possible, but the strength of the government must grow with the expansion of its functions.<sup>58</sup>

He did not view the administrative process as having an independent political direction of its own and wasted no time lamenting the passing of simple government. Because he saw this development as largely inevitable, Freund found little merit in debating the wisdom of the trend. To him the only legitimate area of debate concerned ways to secure private rights, by internal check and judicial review, in the face of the inevitable growth of the administrative process.<sup>59</sup>

#### B. *Control of the "Administrative Branch."*

In the past the accepted view was that the administrative organs of government should be responsible to Congress. In the Landis Report, a modern view

<sup>55</sup> See Pound, *supra* note 52.

<sup>56</sup> Commission on Organization of the Executive Branch of the Government, Task Force Report on Regulatory Commissions (1955).

<sup>57</sup> Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403 (1894).

<sup>58</sup> *Id.* at 424.

<sup>59</sup> Kent, *Ernst Freund—Jurist and Social Scientist*, 41 J. POL. ECON. 145 (1933). As he neared the end of his life, Freund characterized his era as "an era of regulation which combined respect for private right with a growing sense of the social obligations of property and business, and which fully recognized the paramount claims of public interest." FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY*, at viii (1928).

was put forth arguing for a centralization of responsibility under the Executive.<sup>60</sup> This appears to be a modern and characteristic example of the assimilation by the Executive of functions that Congress has proved itself unable to cope with. However, Freund saw the emergence of this trend at a very early date. Although speaking of the chaotic conditions of some of the administrative organs of state governments, his underlying rationale applied to any division of government:

Now the legislature, while it has to some extent increased the executive power of appointment, has withheld from the chief executive all the functions of control, direction and review, which in Europe and also in our federal government hold the administrative organization together.<sup>61</sup>

And again:

The principle of specialization and diffusion of powers without executive direction or control imposes upon the legislature functions which are really administrative. . . . The legislature thus becomes in a certain sense the central administrative authority of the state—a position for which it is altogether unfitted. Executive action is in its nature responsible, because the officer who directs is also bound to see how the direction is carried out, and because the executive authorities are subject to the control of the courts or to impeachment; legislative administration, however, is both legally irresponsible because the legislature is not amenable to any direct control, and morally irresponsible because it is beyond the capacity of a large body to act intelligently on matters in which it has no interest.<sup>62</sup>

### *C. Sovereign Immunity.*

The doctrine that the state cannot be made an unwilling party defendant has been difficult for laymen, as well as some legal scholars,<sup>63</sup> to appreciate. While modifications of the doctrine have removed some of its harshness today, in 1893 Freund recorded that his was a voice in the wilderness in opposing a doctrine "strenuously supported by the current judicial opinion."<sup>64</sup> Typical of that position was the statement of Mr. Justice Holmes:

A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.<sup>65</sup>

Writing contemporaneously with Holmes, Freund traced the history of sovereign immunity. Its origin in English monarchical government was evident.

<sup>60</sup> See Landis, *Report on Regulatory Agencies to the President-Elect* at subsection F, p. 81 (1960).

<sup>61</sup> Freund, *supra* note 57 at 409.

<sup>62</sup> *Id.* at 413.

<sup>63</sup> *E.g.*, DAVIS, *ADMINISTRATIVE LAW* TEXT 450 (1959).

<sup>64</sup> Freund, *Private Claims Against the State*, 8 POL. SCI. Q. 625, 640 (1893).

<sup>65</sup> *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907).

Since the courts functioned under the direction of the sovereign, the King could hardly issue his writ commanding the sheriff to command the King to appear. Voluntary submission was granted in England at an early date under Edward I.<sup>66</sup> But the remedies developed in England did not become part of our common law upon Independence. While our judiciary succeeded to the powers of the English courts, the executive had only such powers as were vested in him. The residuary public power was vested in the legislature. This resulted in a totally *ad hoc* system of redress of grievance by petition to the legislature. Freund noted that, as of 1893, a few states had amended their constitutions to permit claims to be brought against the state governments in the courts. While he considered this movement a step forward, he attacked the notion that it was still a matter of grace and not of right.<sup>67</sup> He especially inveighed against the notion that the courts had a jurisdiction more limited than the liability of the state and maintained that the only question should be the substantive question of the extent of the state's liability. He questioned the distinction drawn between the ability of the courts to grant negative but not affirmative relief. He listed the various subterfuges that the courts used to circumvent the doctrine and concluded that a doctrine inducing such subterfuges should be "condemned and abandoned." He observed the inconsistency with which the courts chose to look behind a suit against an officer of the government to find the real party in interest and inferred that if the whole doctrine could not be eliminated, then the courts should at least consistently refuse to see the real party in interest. Then, in a clear and impelling passage, showing Holmes' logic to be the very conceptualism which Holmes denied, Freund struck at the foundation of the doctrine of sovereign immunity:

There are evidently cases where justice demands the adjudication of right against the state, while the logic of the law apparently forbids it—Apparently, for the conflict is not real. It is believed that subjection to the jurisdiction of the courts is inconsistent with the nature of sovereign power. It is true that the courts themselves derive their power from the state. But the state is an exceedingly complex organism, and its functions are widely divergent. It is guided by proprietary interests, like an individual, in the management of its corporate funds and domain; by public, as opposed to private, interests in the general political administration; while its aim in the dispensation of justice is the purely ideal one of the preservation of law and rights, the concentration of these various functions in one power would be impossible without a separation of organs. Therefore, the administration of justice in every civilized state is vested in organs which are, to all intents and purposes, independent of the government in the narrower sense of the term. Consequently, when the state appears before the courts on a question of property rights, a party in interest appears before an impartial arbiter, and the proceeding is not open to the objection that the

<sup>66</sup> Statutum de Tallagio (1297), 34 Edw. I, 4 c. 1.

<sup>67</sup> Freund, *supra* note 64 at 630-31.

state is a judge in its own cause. Thus, on a true conception of the nature of the judicial power, the subjection of the state to the jurisdiction of the courts involves no inconsistency of functions. . . . It would . . . be absurd to deny that the state can refuse to submit to the jurisdiction of its courts. But why, in the absence of a distinct expression of will, either by the constitution or by the legislature, should a tacit refusal be implied rather than a tacit consent? Would it not be reasonable to assume such a consent where the state descends from the plan of its sovereignty and enters into purely private relations, *that is to say, in all civil causes of action*?<sup>68</sup>

Writing fifty-three years before the Federal Tort Claims Act, he observed that the law was well settled that the government was not liable for tort. From this he deduced that "the clearer the legal wrong and the more unjustifiable the act complained of, so much more undisputed is the exemption of the government from legal liability."<sup>69</sup> He foresaw what was to become the governmental-proprietary distinction in determining the liability of government and correctly prophesied that the distinction could not be completely maintained. He concluded that the courts were even finding no liability for acts of the government or their officers which were blatantly private in nature. He said that the courts were creating this doctrine themselves, at times apparently against the express desire of the legislature.

By 1932, in preparing a report for the International Congress of Comparative Law at the Hague, just two months before his death, Freund could take small comfort in what progress he had seen in the weakening of this doctrine. He noticed that torts were still excluded from the jurisdiction of the Court of Claims and proposed that a congressional act provide for tort jurisdiction. He said that if the doctrine of sovereign immunity could not be dislodged, the government should consistently assume the burden of all judgments rendered against its officers, and the courts should consistently refuse to look behind the officer to see the real party in interest. He found state practice no better than that of the federal government:

[T]he refinement of distinction according to which a city is liable if a person is run over by a street cleaning cart (because its function is proprietary) but not liable if a person is run over by a fire truck (because the function is governmental) is notorious.<sup>70</sup>

#### D. *Extraordinary Remedies.*

The methods by which state courts allow judicial review of administrative actions are now recognized as one of the major deficiencies of administrative

<sup>68</sup> *Id.* at 638-39 (emphasis added).

<sup>69</sup> *Id.* at 644-45.

<sup>70</sup> Freund, *Responsibility of the State in Internal (Municipal) Law*, 9 TUL. L. REV. 1, 15 (1934).

law.<sup>71</sup> It was natural that Freund would be concerned with this problem since two focal points of his work in administrative law were the protection of private rights and the establishment of effective administration. Both of these goals are impeded when interminable litigation centers around problems of procedure. As early as 1911,<sup>72</sup> Freund attacked the remedies as a "needless legal archaism." He observed that even where states had reduced the forms of action to one, the remedies refused to die. They differed in scope, being sometimes concurrent and sometimes exclusive, no one being quite sure which remedy fitted which fact situation. He described their boundaries as being wholly arbitrary and differing from state to state due to "historical accident."

#### *E. Separation of Powers—Separation or Safeguards?*

At a time when most writers bewailed the breakdown of the separation of powers caused by the growth of administrative agencies, Freund was able to see the complexities and inevitability in this problem. His detached and analytical examination of this question can not be appreciated without reading the polemics of the time directed to the same issue.<sup>73</sup> Although Freund's main concern was with efficient administrative process and the preservation of individual rights, he saw that the latter was not necessarily sacrificed for the former merely by a breakdown of strict separation:

With the growing tendency to make administrative findings of fact, based on notice and hearing and supported by evidence, conclusive, the objection that the proceeding involves a confusion of functions cannot be dis-

<sup>71</sup> "No branch of administrative law is more seriously in need of reform than the common law of the state courts concerning methods of judicial review. . . .

"An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies. . . ." DAVIS, *ADMINISTRATIVE LAW* TEXT 443 (1959).

<sup>72</sup> FREUND, *CASES ON ADMINISTRATIVE LAW* 2-3 (1911).

<sup>73</sup> In 1934 the American Bar Association committee on administrative law said: "The judicial branch of the Federal Government is being rapidly and seriously undermined. . . . The committee . . . concludes that, so far as possible, the decision of controversies be brought back into the judicial system." 59 A.B.A. REP. 539, 549 (1934); James M. Beck, a former Solicitor General of the United States, published a book in 1932, declaring that all Federal administrative agencies were unconstitutional violations of the separation of powers. BECK, *OUR WONDERLAND OF BUREAUCRACY* (1932). See also note 54 *supra* and accompanying text. This antagonism, while greatly increased by the activities of the New Deal, existed prior to that time. In 1927, John Dickinson proposed a total separation of executive and judicial functions on an agency basis: "The multiplication in recent years of bodies like public-service commissions and industrial-accident boards, accompanied by the vesting of ampler powers in health officers, building inspectors, and the like, has raised anew for our law, after three centuries, the problem of executive justice. That government officials should assume the traditional function of courts of law, and be permitted to determine the rights of individuals, is a development so out of line with the supposed path of our legal growth as to challenge renewed attention to certain underlying principles of our jurisprudence." DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 3 (1927).

missed as being entirely devoid of merit. The same body acts as prosecutor and judge, and is expected to pursue and enforce policy and to make impartial determinations. Abstractly, this is perhaps not as it should be; but practically the combination of supervising and determinative functions does not seriously jeopardize the capacity for impartial action, as long as there is the possibility of checking abuse by judicial control; in any event, the order-issuing power appears to have gained a place in American government from which it is not likely to be . . . dislodged.<sup>74</sup>

To Freund, the critical point was the availability of safeguards to preserve individual rights rather than strict separation of powers.

Freund observed the tendency of the courts themselves to rely on bureaucratic organization when called upon to exercise non-judicial powers (*e.g.*, naturalization, adoption, drainage districts);<sup>75</sup> and rather than attacking the centralization of administrative powers, he concluded that the centralization better guaranteed the fair exercise of administrative power.<sup>76</sup>

#### F. *Discretionary Powers.*

To the modern reader, one strongly held belief of Freund's seems strangely inconsistent with his liberal support of the administrative process<sup>77</sup> and his practical realization of the inevitability<sup>78</sup> of its growth. This was his seemingly rigid belief that administrative discretion is an unmitigated evil to be avoided and eventually replaced with more definite legislative standards. In 1923, speaking before the Bar Association of St. Louis, he presented a masterful survey of the history of American administrative law. During the course of the lecture he attacked the growth of administrative discretion in unqualified terms rarely used by this careful and precise scholar:

What we cannot say of administrative power in general we can say of discretionary administrative power over individual rights, namely that it is undesirable *per se* and should be avoided as far as may be, for discretion is unstandardized power and to lodge in an official such power over person or property is hardly conformable to the "Rule of Law."<sup>79</sup>

If this were the only statement of this nature made by Freund, it might be explained away by reasoning that in addressing a Bar Association, he was not

<sup>74</sup> FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 170-171 (1928).

<sup>75</sup> *Id.* at 33-35.

<sup>76</sup> *Id.* at 40. However, Freund showed a propensity for what has turned out to be the losing side of the argument concerning the scope of judicial review of administrative actions. He granted that where Congress by statute limits judicial review to questions of law that review should be strictly limited. But he maintained that where the statute is silent regarding the scope of review, the courts should have power to review not only whether the decision was supported by *any* evidence, but whether the decision was supported by the *preponderance* of the evidence.

<sup>77</sup> See p. 770 *supra*.

<sup>78</sup> FREUND, THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 20 (1923).

<sup>79</sup> *Id.* at 22-23.

speaking to the most revolutionary body of men. His attack undoubtedly fell upon receptive ears. However, when properly circumscribed by a definition of what Freund meant by "individual rights," the statement probably represents his honest belief. How, then, can it be harmonized with his general confidence in the administrative process?

Perhaps, a complete reconciliation of these views cannot be achieved. Freund was far too complex an individual to be categorized as either a "liberal" or as a "conservative." Some of the apparent inconsistency, however, disappears when other factors are taken into account. He defined "administrative discretion" as follows:

When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of considerations not entirely susceptible of proof or disproof. A statute confers discretion when it refers an official for the use of his power to beliefs, expectations, or tendencies instead of facts, or to such terms of "adequate," "advisable," "appropriate," "beneficial," "competent," "convenient," "detrimental," . . . or their opposites.<sup>80</sup>

Had his definition of the administrative discretion to be proscribed ended at this point, the most that could be said for his view would be that it was very conservative and very dated. However, Freund made a further delimitation as to the type of discretion which should be limited as much as possible. This delimitation was not understood by his greatest critic on this issue, a fact which, it is submitted, substantially contributed to the inaccurate opinion held by many in regard to Freund's views on administrative discretion.

Dean Wigmore, writing over a year after Freund's speech before the St. Louis Bar Association, attacked his views on administrative discretion. Dean Wigmore contended that the "bestowal of administrative discretion, as contrasted with the limitation of power by a meticulous chain-work of inflexible detailed rules, is the best hope for governmental efficiency. What is needed only is not reduction, but *control*, of discretion."<sup>81</sup> As an example of this proposition, he cited the "finest local government in the whole United States," that of the Canal Zone under Governor Goethals, as being one of "pure discretion, administratively, from top to bottom."<sup>82</sup> The issue between Freund and Wigmore, as Wigmore saw it, was whether *reduction* or *control* of discretion was the answer.

Later that year, Freund replied to Wigmore's criticism.<sup>83</sup> He qualified his indictment of administrative discretion in ways only alluded to in his St. Louis address. He said that discretion had many different aspects as applied

<sup>80</sup> FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 71 (1928).

<sup>81</sup> Wigmore (Editorial Note), 19 ILL. L. REV. 440, 441 (1925).

<sup>82</sup> *Ibid.*

<sup>83</sup> Freund, *Administrative Discretion: A Reply to Dean Wigmore*, 19 ILL. L. REV. 663 (1925).

to different activities of government. His reference to administrative discretion was aimed only at discretion exercised over private rights. He admitted that discretion in "administering governmental services presents a different problem."<sup>84</sup> Freund quite justifiably pointed out that Wigmore, in choosing the example of the Panama Canal Zone government, did not recognize this distinction. Discretionary powers over private rights, he said, should be gradually replaced with more concrete rules, while discretionary powers over the administration of governmental services would always have to exist and be controlled by internal procedural checks and judicial review.

By 1928 these views seemed to be both modified and clarified. Freund still made a basic distinction between discretionary powers over private rights and discretionary powers concerned with the performance of governmental services; however, the intervening five years between his St. Louis speech and the writing of *Administrative Powers Over Persons and Property*<sup>85</sup> had witnessed an injection of realism into his views on administrative discretion. During this time he reached several conclusions that had a direct bearing on his views on administrative discretion. While the following conclusion was reached by him many years before, it would appear that he first realized its relevance to the problem of administrative discretion in his later years. He had concluded that the era of laissez-faire governmental policy was through forever:

Most of those who are beyond middle life have been educated to regard neutrality with reference to business as the orthodox and desirable attitude of the state. The theory which this attitude reflects was probably well suited to a period of profound economic transformation which could have been directed by law neither successfully nor intelligently. Now the lines of that transformation have become tolerably clear, and since one of the outstanding features of the new organization of business is the service of large numbers of persons by particular concerns, standardization of methods is almost inevitable, and it is perhaps equally inevitable that this standardization should in course of time express itself in law. The tendency in other words seems to be toward legislative regulation of economic activity.<sup>86</sup>

From this, with the realization that society would continue to become increasingly interdependent, he concluded that two major alternatives faced the United States. Basic industries and utilities could be socialized, as had been done to a considerable degree on the continent.<sup>87</sup> However, if this alternative were rejected for a system of free enterprise, he felt that a system of governmental control was inevitable.<sup>88</sup> He recognized that the United States had elected to follow the latter alternative and that a concomitant of this choice

<sup>84</sup> *Ibid.*

<sup>85</sup> FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* (1928).

<sup>86</sup> FREUND, *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 20 (1923).

<sup>87</sup> FREUND, *op. cit. supra* note 85 at 79.

<sup>88</sup> See pp. 770-71 *supra*.



was increased discretionary power. Here again his distinction between the uses of administrative discretion was relevant. In refuting Wigmore, he had distinguished the administrative discretion exercised in providing services to the general public from that exercised directly over private rights. To him, the Canal Zone government was largely of the former type, where discretionary powers were both necessary and desirable.<sup>89</sup>

An examination of the situations in which he considered discretion to be undesirable is illuminating. He defined "unqualified discretion" as that discretion in which "private action is made dependent upon official approval or consent by reference to simple permissive terms without stating the grounds upon which the official power is to be exercised."<sup>90</sup> For example, suppose a statute provided that a license may be granted "if in the best interest of the state of New York." Freund recognized that initially such broad discretionary power must be granted where it appeared impossible to enumerate exactly under what circumstances a license should be granted or refused. However, after granting a number of licenses, similar fact situations would present themselves. What Freund emphasized was that the administrative body granting the licenses should not be allowed to act in opposite ways given the same fact situations. The "public interest" begins to take on, through the years, more definite meaning. Past decisions and added experience circumscribe the broad discretion originally held by the agency. Gradually a body of precedent would create what Freund called "expert discretion" replacing the "unqualified discretion" that previously existed. In some areas, Freund hoped for a further step: the vast experience gained by the administrators might lead to the conversion of "expert discretion" into definite legislative standards.<sup>91</sup>

Another limitation upon administrative discretion which he favored, and one that is hard to criticize, was that all statutes granting discretionary powers should set forth the purpose and scope of the discretion. For example, "a local authority having power over the construction of buildings may not refuse a permit on account of the supposed unsuitability of the building to the neighborhood."<sup>92</sup> A licensing requirement ostensibly (but not so specified in the statute) designed to prevent the use of flammable films in movie houses should not be interpreted to permit denial of licenses because shareholders of a moving picture corporation were enemy aliens.<sup>93</sup> It should be remembered that this gradual diminution of administrative discretion was looked for only in the area of discretionary powers dealing with private rights. In this area, Freund looked upon discretion as a temporary expedient to permit the eventual estab-

<sup>89</sup> See note 83 *supra*.

<sup>90</sup> Freund, *op. cit. supra* note 87 at 89.

<sup>91</sup> *Id.* at 97-103.

<sup>92</sup> *Id.* at 93.

<sup>93</sup> *Id.* at 96.

lishment of a definite rule by trial and error methods.<sup>94</sup> However, he was not so unrealistic as to believe that at some later point all discretionary powers in this area could be eliminated. He recognized that "with new problems, new applications of such discretion" would be warranted.<sup>95</sup>

In conclusion, what Freund desired to see was an expanding body of procedural and substantive law, created by the courts, the legislatures and the administrative agencies. He expected that as recurrent fact situations presented themselves to the regulatory agencies, a body of precedent would evolve, gradually circumscribing the degree of discretion exercised by the agencies. The desirability of this development could hardly be denied. The alternative would seem to be not Wigmore's "controlled discretion," but bald, arbitrary action. This growth of procedural and substantive precedent was to be complemented by an increasing body of legislation that included meaningful standards made possible by continuing administrative experience. Continued experience was, for example, to result in a more exact knowledge of what constituted a rate that was "fair and reasonable." This phrase was thus to be replaced by what the administrative agency had found, through experience, to be "fair and reasonable."

The function to discretion would then be not to displace rule but to prepare the way for it. On any other terms administrative discretion would be an anomaly. It would mean that administrative authorities are superior to courts in their capacity to deal with private rights, or that under modern conditions the public welfare demands personal government instead of government by law. The French say that "personal" in government is equivalent to "arbitrary." And while there is undeniably some tendency on the part of administrative authorities, as an abstract proposition, to claim the necessity of discretionary powers, it will probably be found, upon examination, that in practice the desire to standardize the exercise of discretionary power is as strong as it is in the administration of justice.<sup>96</sup>

#### G. *Proper Subjects for Administrative Action*

Freund believed that one reason for the distrust of the administrative process was its improper use. He felt that policy decisions involving highly controversial issues should not be passed on to the administrative agencies, but should be made by the legislature. He maintained that the problem of improper discretion would be reduced if legislative bodies would assume responsibility for basic policy decisions. He further objected to the use of judicial procedure by administrative agencies to settle questions of fact which were essentially

<sup>94</sup> For an interesting parallel to Freund's idea regarding this gradual evolution of questions of law or fact from trial and error methods, see *Baltimore and O. R.R. v. Goodman*, 275 U.S. 66 (1927), and its fate in *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934).

<sup>95</sup> Freund, *op. cit. supra* note 85 at 101.

<sup>96</sup> *Id.* at 102.

legislative in nature. After observing that "the difference between law and fact becomes obscure" in many situations, he said:

We should bear in mind that underlying these difficulties of administrative procedure is the attempt to answer perplexing questions of economic policy by the method of trial from case to case . . . . It seems to be believed that by a combination of administrative and judicial action it will be possible to evolve a code of fair dealing; perhaps it can be done in part, but it is not likely that highly controverted issues will be ultimately settled otherwise than by direct legislative action.<sup>97</sup>

#### V. CONCLUSION

Ernst Freund's greatest contribution to administrative law was in defining the subject and setting its direction. Since his death in 1932, the field of administrative law has burgeoned in size and complexity. One could not expect that a casebook written in 1911 would contain the same topics treated today. Nor could one expect the substantive views of a scholar writing before the New Deal to be in complete harmony with the thinking of today. But what is truly remarkable is that Freund was able to discern, even before this century began, the general direction and scope of administrative law; to see that the administrative process rather than constitutional issues had to be examined; that a choice need not be made between individual rights and administrative effectiveness; that administrative law was a legitimate field of the law, worthy and capable of being studied in the law schools. For this he well deserved the title—"Pioneer."

<sup>97</sup> Freund, *Commission Powers and Public Utilities*, 9 A.B.A. J. 285, 287 (1923).